

November 13, 2000

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON APPEAL OF NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E0000443**

JAMES GRAHAM
Code Enforcement Appeal

Location: 26252 Southeast 216th Street

Appellant: **James Graham**
26252 SE 216th Street
Maple Valley, WA 98038
Telephone: (425) 432-9741

King County: Department of Development and Environmental Services,
Site Development Services, *represented by*
Chris Tiffany
900 Oakesdale Avenue SW
Renton, WA 98055-1219
Telephone: (206) 296-7049
Facsimile: (206) 296-7055

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:
Department's Final Recommendation:
Examiner's Decision:

Deny the appeal
Deny the appeal
Deny the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:
Hearing Closed:

November 9, 2000
November 9, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Grading
- Filling
- Wetlands
- Sensitive areas

SUMMARY:

Denies code enforcement appeal regarding filling in wetland.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. **Notice and Order Served.** On August 1, 2000, the Department of Development and Environmental Services ("Department" or "DDES") served upon James W. Graham ("Appellant") a Notice of King County Code Violation: Civil Penalty Order: Abatement Order: Notice of Lien: Duty to Notify ("notice and order") regarding certain grading activities at 26252 Southeast 216th Street ("subject property"). Specifically, the Department cited the Appellant with violations of KCC 16.82.060 and KCC 21A.24.320 for "filling within a sensitive area (wetland) or buffer without the required permits and/or approvals."

In order to obtain compliance, the notice and order commanded Appellant Graham apply for and obtain a grading permit. The notice and order advised further that:

The application shall include a sensitive area restoration plan as specified in KCC 21A.34.340.A.1-5 and must be completed in accordance with the guidelines outlined in the King County Development Assistance Bulletin No. 28....

2. **Appeal Filed.** On August 7, 2000, the Department received Mr. Graham's appeal. The Appellant argues the following:
 - The area was not "standing water 3 to 4 months of winter" until a nearby road culvert (beneath Southeast 216th Street) plugged. The County has consistently failed to maintain that culvert over the two past decades or so.
 - An old well is located in the sensitive area at issue. For safety reasons, it needs to be filled and covered.

- When the property was acquired in 1962 the area at issue was a mowed grassy lawn, dry most of the year.

During the course of the hearing, the Appellant argued further:

- That the Department soils analysis depends upon a hole dug 20 feet north from the wetland.
- That the culvert outlet was under a foot of dirt, thereby obstructing free flowing drainage.
- That cedars within the wetland vicinity were planted in a row (and therefore not a “natural” wetland area growth).
- That the “flooding” began in approximately 1979-1980 as a result of inadequate County road maintenance.

3. **Relevant Findings.** The following findings are relevant:

- a. In order to be classified “wetland” an area must contain three characteristics: wetland (hydrophytic) vegetation; hydric soils; and, periodic or seasonal presence of water. Testimony, MacWhinney and Tiffany. See also KCC 21A.24. The area at issue within the subject property (as described by Exhibit Nos. 2, 4, 5, 12 and 20) contains strong evidence of all three wetland identifiers.
- b. The hydric soils within the area of concern were identified in a 1972 United States Soil Conservation Service survey. See Exhibit No. 12. In addition, wetland scientist Betsy MacWhinney obtained three samples of the soils which confirmed their hydric character. The Appellant argues that her sample strayed too far from the landfill in question (approximately 20 feet). In response, Ms. MacWhinney testifies that the same wetland/identifier vegetation existed throughout the area between her soil sample and the landfill of concern.
- c. The area of concern bears wetland vegetation, particularly “slough sedge.” Slough sedge grows with a 99% probability of being located within a wetland. Testimony, MacWhinney.
- d. The periodic/seasonal flooding of the area in question is agreed to by the parties, although the Appellant argues it occurs due to poor County road maintenance and not due to “natural” causes. The King County Wetlands Inventory Notebook, Volume 2 East, published January, 1983, identifies the area of concern in this review as “Lower Cedar River Wetland No. 71,” a pallustrine, forested wetland. Exhibit No. 4. At that time, the survey gave the wetland a Class 3 rating. However, due to its present forested condition, and due to changes in County definitions, it may now qualify as a forested *Class 1* wetland. Testimony, MacWhinney.

- e. The King County Department of Assessments identifies the area of concern as being a 0.5 acre wetland. According to a letter from Sheila Frawley, Senior Appraiser, King County Department of Assessments, the subject parcel has been given a “five percent reduction to the land assessed value to account for the wetland area on site.” Exhibit No. 5. This percentage reduction corresponds to the area of the wetland as a percentage of the subject property area.¹
 - f. The preponderance of the evidence supports the Department’s position that unauthorized landfill conducted by Appellant James Graham is now situated on a wetland located on the Graham property. That fill was placed by Mr. Graham or at his direction.
4. **Department Report Adopted.** The preliminary report to the Examiner prepared by the Department (Exhibit No. 1) is accurate, adopted and incorporated here by this reference.

CONCLUSIONS:

1. KCC 21A.06.1415 anticipates and addresses situations such as this one, in which the Appellant argues that the disputed wetland was created by artificial means. KCC 21A.06.1415 says, in part, “wetlands do not include...those wetlands created after July 1, 1990 that were unintentionally created as a result of the construction of a road, street or highway.” Thus, even if the Appellant is correct, that the wetland was created as a result of a plugged culvert since 1980, KCC 21A.06.1415 requires that it be regarded as a wetland nonetheless. However, the Appellant’s argument is contradicted by the evidence that the wetland indicator soil was found in this location by the United States Soil Conservation Service in 1972, and appeared in the 1983 County inventory.
2. Thus, all three characteristics which compel wetland identification are present on the portion of the subject property which is of concern in this review. However, code requires that only two of those characteristics need be identified. Thus, even without the “standing water” criterion, the area of concern nonetheless manifests hydrophytic vegetation and hydric soils.
3. The presence of fill is documented by photographs provided by both the Department and the Appellant. See Exhibit Nos. 2 and 21. The rock and dirt fill at issue comprises approximately 100 cubic yards. Testimony, Graham.
4. Arguments regarding well capping are not relevant to this review. Washington State Department of Ecology provides standards and procedures regarding well capping. See WAC 173.160.381, which requires well decommissioning to be “recorded and reported” by the State Department of Ecology. Regardless of whether the well is now a couple of feet or a few inches deep (testimony varied) the proper procedure is to obtain State Department of Ecology approval first. In this case, it also would have been useful to have obtained King County Department of Development and Environmental Services review as well.

¹ Subject parcel comprises 9.77 acres; wetland 0.50 acres; thus, the wetland area comprises 5.11% of the total property area.

DECISION:

The appeal is DENIED.

ORDER:

The Department's August 1, 2000 notice and order is REINSTATED. The Appellant James W. Graham shall apply for and obtain a grading permit as required by the August 1, 2000 notice and order. The schedule of deadlines shall be the same as established by the August 1, 2000 notice and order, counting forward beginning three days following the date of this order. The schedule of civil penalties shall be the same as contained in the Department's notice and order.

Nothing in this order shall be construed as limiting either the Department or the King County Prosecutor with regard to the various enforcement and prosecutorial options established by KCC Title 23 or by other applicable law.

ORDERED this 13th day of November, 2000.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 13th day of November, 2000, by certified mailing to the following parties:

James W. Graham
26252 SE 216th Street
Maple Valley, WA 98038

TRANSMITTED this 13th day of November, 2000, to the following parties and interested persons:

James & Verla Graham
26252 SE 216th St
Maple Valley WA 98038

Paul Allen
KCDOT/Roads Division
MS-KSC-TR-0222

Roger Bruckshen
DDES/BSD
Code Enforcement Section
MS OAK-DE-0100

Elizabeth Deraitus
DDES/BSD
Code Enforcement Section
MS OAK-DE-0100

Elizabeth J. MacWhinney
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Randy Sandin
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Joan Snyder
DDES/LUSD
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Chris Tiffany
DDES/LUSD
Site Development Services
MS-OAK-DE-0100

Fred White
DDES/LUSD
Site Development Services
MS OAK-DE-0100

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE NOVEMBER 9, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0000443 – JAMES GRAHAM:

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Chris Tiffany, Fred White and Betsy MacWhinney; also Paul Allen of KCDOT. Participating in the hearing and representing the Appellant were James and Verla Graham. There were no other participants in this hearing.

The following exhibits were offered and entered into the record:

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|----------------|--|
| Exhibit No. 1 | DDES staff report to the Hearing Examiner, dated November 9, 2000 |
| Exhibit No. 2 | Photographs taken by Chris Tiffany, dated March 24, 2000 |
| Exhibit No. 3 | Stop Work Order, dated March 24, 2000 |
| Exhibit No. 4 | 1983 King County Wetland Inventory Sheet for Lower Cedar River Wetland No. 71 |
| Exhibit No. 5 | Memorandum from King County Assessor, dated October 24, 2000 |
| Exhibit No. 6 | Notice and Order for E0000443, dated August 1, 2000 |
| Exhibit No. 7 | Appeal of the Notice and Order to the Hearing Examiner, dated August 15, 2000 |
| Exhibit No. 8 | Citizen's Action Request to KCDOT, dated October 6, 2000 |
| Exhibit No. 9 | Memo from Paul Allen of KCDOT, dated October 24, 2000 |
| Exhibit No. 10 | Pre-Hearing Order, dated October 11, 2000 |
| Exhibit No. 11 | Photograph by Fred White of Graham property well site, dated October 17, 2000 |
| Exhibit No. 12 | Memo from Betsy MacWhinney, DDES Senior Ecologist, dated October 24, 2000 |
| Exhibit No. 13 | Facsimile of well decommissioning standards from WADOE, date October 20, 2000 |
| Exhibit No. 14 | Tax Parcel information from DDES computer files |
| Exhibit No. 15 | Assessor's Map showing subject property |
| Exhibit No. 16 | Site map showing location of property |
| Exhibit No. 17 | Copy of King County Code 21A.06.1415 providing a definition of wetlands |
| Exhibit No. 18 | King County witness lists for the November 9, 2000 hearing |
| Exhibit No. 19 | File case notes from DDES Permits Plus Computer files |
| Exhibit No. 20 | Written statement of James Graham with attached copy of King County GIS map |
| Exhibit No. 21 | Four pages of photographs (6 photos), submitted by Appellant |
| Exhibit No. 22 | Property measurements, submitted by Appellant |
| Exhibit No. 23 | Copy of WADOE Minimum Standards for Construction & Maintenance of Wells, Chapter 173-160 WAC |

RST:sje
Code enf/E0000443 RPT